

## MITIGATION THROUGH EMPLOYMENT IN PERSONAL INJURY CASES: THE APPLICATION OF THE “REASONABLE” STANDARD AND THE WEALTH EFFECTS OF REMEDIES\*

### I. INTRODUCTION

“[O]ne injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.”<sup>1</sup> This fundamental damages doctrine, although not absolute,<sup>2</sup> is applied in many contexts such as: landlord and tenant disputes,<sup>3</sup> wrongful discharge claims,<sup>4</sup> breach of contract claims,<sup>5</sup> and various tort claims,<sup>6</sup> including personal injury actions.<sup>7</sup> Within the personal injury context, the duty to mitigate often arises in two situations: first, when the defendant claims that the plaintiff failed to seek medical treatment post-injury, thereby failing to mitigate the extent of physical harm caused to the plaintiff,<sup>8</sup> and second, when the defendant argues that

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\* I gratefully thank Professor Alfred L. Brophy for calling my attention to the effects of wealth on remedies and for his guidance in developing this Comment.

1. RESTATEMENT (SECOND) OF TORTS § 918(1) (1979).
2. *Id.* § 918(2) (instructing that the duty to mitigate does not prevent recovery in intentional torts unless the victim “intentionally or heedlessly failed to protect his own interests”).
3. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-1370 (2000) (“If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental.”); KAN. STAT. ANN. § 58-2565(c) (1994 & Supp. 2004) (“If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental.”).
4. *See, e.g.*, *Martin v. Santa Clara Unified Sch. Dist.*, 125 Cal. Rptr. 2d 337 (Cal. Ct. App. 2002); *Reinneck v. Taco Bell Corp.*, 696 N.E.2d 839 (Ill. App. Ct. 1998); DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 98 n.4(a) (2d ed. 1994).
5. *See, e.g.*, *Hyosung Am., Inc. v. Sumagh Textile Co.*, 25 F. Supp. 2d 376 (S.D.N.Y. 1998), *aff’d*, 189 F.3d 461 (2d Cir. 1999); *Business Men’s Assurance Co. of Am. v. Graham*, 891 S.W.2d 438 (Mo. Ct. App. 1994); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”).
6. *See* PETER CANE, *TORT LAW AND ECONOMIC INTERESTS* (2d ed. 1996) (providing an overview of torts against property, libel and slander, and the coexistent duty to mitigate).
7. *See* Kevin C. Klein & G. Nicole Hininger, *Mitigation of Psychological Damages: An Economic Analysis of the Avoidable Consequences Doctrine and its Applicability to Emotional Distress Injuries*, 29 OKLA. CITY U. L. REV. 405 (2004); C.R. McCorkle, Annotation, *Pleading Matter in Mitigation of Damages in Tort Action Other Than Libel and Slander*, 75 A.L.R. 2d 473 (1961).
8. *Hall v. Dumitru*, 620 N.E.2d 668, 673 (Ill. App. Ct. 1993) (holding plaintiff had no duty to undergo surgery to mitigate damages caused by defendant’s negligence); DAN B. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 8.9, at 579-81 (1973). A further example of the mitigation doctrine is found in the oft-used argument that the plaintiff could have mitigated her injuries by wearing a seat belt. This “seat belt defense” is thoroughly discussed in other tort literature and will not be addressed here. *See, e.g.*, Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction under the Seat Belt Defense*, 73 MINN. L. REV. 1369 (1989); Michael B. Gallub, Note, *A Compromise Between Mitigation and Comparative Fault?: A Critical Assessment of the Seat Belt Controversy and a Proposal for Reform*,

the plaintiff failed to seek gainful employment in order to reduce claims for lost wages or loss of earning capacity.<sup>9</sup> This Comment is limited to the latter scenario involving personal injury plaintiffs' duty<sup>10</sup> to seek or obtain gainful employment following an injury that leaves them unable to perform their pre-injury job. Part II of this Comment explains how the duty to mitigate and its guidepost, the "reasonableness" standard, further general economic goals of tort damages within the personal injury context. Part III explores whether judicial application of the reasonableness standard in personal injury actions successfully furthers these economic goals and whether the wealth or occupation of the injured party plays a role in the application of the seemingly nondiscriminatory duty to mitigate.<sup>11</sup>

## II. ECONOMICS OF TORT REMEDIES IN PERSONAL INJURY ACTIONS

### A. *Economic Goals of Tort Damages for Loss of Earning Capacity and Loss of Earnings*

The fundamental goal of damages<sup>12</sup> in personal injury actions is to "compensat[e] the victim[s] or mak[e] good [their] losses."<sup>13</sup> The tort victim should be made as close to whole as possible, which requires individualized remedies based on the utility, wealth, or welfare of the victim.<sup>14</sup> This "corrective justice" theory of damages ensures that tort victims do not suffer loss at the hands of a wrongdoer without providing a windfall to the tort

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14 HOFSTRA L. REV. 319 (1986).

9. See discussion *infra* Part III.

10. Although the word "duty" is often used to convey an injured party's obligation to minimize damages, many commentators argue that "duty" is the wrong word to use since the mitigation doctrine does not create an affirmative duty on the injured party to do anything, i.e., no one can bring a cause of action against him for failure to mitigate. See 2 STUART M. SPEISER, CHARLES F. KRAUSE & ALFRED W. GANS, *THE AMERICAN LAW OF TORTS* § 8.3, at 505-06 (2003) ("[T]he failure to take reasonable action to limit damages creates no affirmative right in anyone. . . . Thus, this doctrine should be viewed as disability on . . . recovery of reasonably avoidable damages."). Therefore, some commentators prefer to use the phrase "avoidable consequences" to express the obligation to mitigate at the risk of not recovering those damages which an injured party reasonably could have prevented. WILLIAM L. PROSSER, JOHN W. WADE & VICTOR E. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 525 n.1 (8th ed. 1988). However, because the phrase "duty to mitigate" is so entrenched in legal vocabulary, see 2 DAN B. DOBBS, *LAW OF REMEDIES* § 8.7(2), at 511 n.6 (2d ed. 1993), I will use it to express the basic mitigation obligation as set forth in the Restatement.

11. This Comment represents a tiny glimpse into a much larger debate examining the intersection between the making and application of law and the economic goals the law is designed to foster, in light of the wealth and social status of the people it affects. For a more thorough treatment of this debate, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH-CENTURY AMERICA* (1997); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (reviewing KARSTEN, *supra*).

12. Although the "damage" (injury) sustained by the tort victim may differ in amount from the "damages" (liability) imposed on the tortfeasor, see STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 127 (1987), I intend the term "damage(s)" to mean a remedy payable by the tortfeasor upon legal judgment in favor of the victim.

13. DOBBS, *supra* note 8, at 540.

14. Jules L. Coleman, *Adding Institutional Insult to Personal Injury*, 8 YALE J. ON REG. 223, 228 (1991).

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victim at the wrongdoer's expense.<sup>15</sup> Additionally, tort damages allow potential tortfeasors to achieve optimal levels of care to prevent injury.<sup>16</sup> If the cost of preventing an injury is more than the likely magnitude of the injury multiplied by the probability of the injury, then the potential tortfeasor is not negligent in failing to take such precautions.<sup>17</sup> Thus, with perfect information, the potential tortfeasor can weigh the possibilities of action (taking the precautions) and non-action (failing to take the precautions), and should be motivated to follow the more economically sensible path,<sup>18</sup> thereby achieving the "optimal level of care."<sup>19</sup> The end result of this relatively new<sup>20</sup> aspect of tort damages "maximize[s] the value of conflicting activities . . . [so that] [t]he law is said to be efficient to the extent it encourages efficient activity and discourages inefficient activity."<sup>21</sup>

This general economic theory of damages must be applied to the specific damages recoverable in a personal injury action. When a personal injury plaintiff claims pecuniary damages resulting from permanent or temporary displacement from her job,<sup>22</sup> the plaintiff can recover for "past or prospective . . . loss or impairment of earning capacity."<sup>23</sup> Specifically, the plaintiff may recover "either specific income loss, past and future, *or* loss of earning capacity."<sup>24</sup> A recovery for a loss of earnings claim compensates the plaintiff for earnings lost between the time of injury to trial<sup>25</sup> and for future lost earnings extending from trial into the future.<sup>26</sup> Loss of past earnings must take into account interest that could have accrued on the earnings so as to not under compensate the plaintiff,<sup>27</sup> while loss of future earnings must be discounted back to present value to prevent overcompensating the plaintiff.<sup>28</sup> The economic premise behind loss of earnings is to provide a "finite

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15. See LAYCOCK, *supra* note 4, at 17.

16. SHAVELL, *supra* note 12, at 145.

17. This is the classic recitation of the "Hand formula" for negligence, introduced by Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 180-81 (5th ed. 1998); see also Frank J. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383, 383 (1986). Tort damages and their definable sphere of applicability aid in defining the magnitude of injury, although as discussed in note 12, the magnitude of injury may not equate to the damages imposed.

18. SHAVELL, *supra* note 12, at 8.

19. *Id.* at 145.

20. See HORWITZ, *supra* note 11, at 80-82.

21. See LAYCOCK, *supra* note 4, at 17.

22. The intersection between economics and tort damages applies here only to these pecuniary damages. Causes of action for injuries to the person, pain and suffering, and emotional distress interject entirely new problems with economic theories of tort damages, see Vandall, *supra* note 17, at 384, and are beyond the scope of this Comment.

23. RESTATEMENT (SECOND) TORTS § 924 (1979).

24. DOBBS, *supra* note 10, § 8.1(2), at 361; see also EDWARD C. MARTIN, *PERSONAL INJURY DAMAGES LAW AND PRACTICE* 21-22 (1990) (explaining that a personal injury plaintiff's damages consist in part of "wages actually lost prior to the time of trial . . . as well as lost future compensation").

25. MARTIN, *supra* note 24, at 22-23; 2 JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 6:5, at 6-17 (3d ed. 1997).

26. MARTIN, *supra* note 24, at 27.

27. DOBBS, *supra* note 10, § 8.4, at 454 n.5; MARTIN, *supra* note 24, at 169.

28. A future award not discounted back would overcompensate the plaintiff by allowing him to "get his future wages long in advance and to reap interest upon the money during the intervening period."

sum of money [that] can provide complete recompense”<sup>29</sup> by a “compelled wealth transfer[] designed to reestablish, as far as possible, the *status quo ante*.”<sup>30</sup>

On the other hand, the victim could choose to plead recovery for lost or diminished earning capacity.<sup>31</sup> The measure of recovery for loss of earning capacity is not simply a difference in earnings before and after the injury but instead focuses on the plaintiff’s *ability* to earn;<sup>32</sup> consequently, tort plaintiffs can recover for loss of earning capacity even where they earn as much or more income than before the injury.<sup>33</sup> To calculate, a plaintiff’s post-injury earning capacity is deducted from plaintiff’s pre-injury earning capacity, multiplied by plaintiff’s work-life expectancy, and then discounted back to the present value.<sup>34</sup> From an economic standpoint, this formula ensures that the plaintiff is not overcompensated but rather placed in the “same economic position as [plaintiff] would have been [] had the injury not occurred.”<sup>35</sup>

*B. The Role of Mitigation and Reasonableness in Furthering the Economic Goals of Tort Damages for Pecuniary Injuries*

The loss awarded to an injured party in the American tort system is the amount of loss that the party could not have reasonably avoided plus the costs incurred in limiting potential further losses,<sup>36</sup> reflecting both the positive and negative aspects of the duty to mitigate.<sup>37</sup> The duty to mitigate applies both to claims for loss of past and future earnings and to claims for loss of earning capacity.<sup>38</sup> The economic rationale behind the duty to mitigate is that plaintiffs have the power to “minimiz[e] total accident costs”<sup>39</sup> and “conserve the economic welfare and prosperity of the whole community . . . [by not] passively suffering economic loss which could be averted by reasonable efforts.”<sup>40</sup> In addition to preventing waste of societal resources, the duty to mitigate directly motivates tort victims to make the economically wise choice to mitigate their losses, as they cannot recover for the losses

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CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 304 (1935).

29. CANE, *supra* note 6, at 5.

30. Coleman, *supra* note 14, at 227.

31. DOBBS, *supra* note 10, § 8.1(2), at 362 (“If he prefers, the plaintiff is entitled to recover for lost or diminished earning capacity rather than for specific wage loss.”).

32. *Id.* at 362-63.

33. *Id.* at 363.

34. STEIN, *supra* note 25, § 6:5.

35. *Id.* § 6:5, at 6-16.

36. SHAVELL, *supra* note 12, at 145-46; *see also* Charles T. McCormick, *Avoiding Injurious Consequences*, 37 W. VA. L.Q. 331, 355 (1931) (discussing recovery for expenses or injury incurred in efforts to minimize loss).

37. DOBBS, *supra* note 10, § 8.7(2), at 510. The positive aspect is that the plaintiff is allowed to recover for expenses incurred in mitigating; the negative aspect is that the plaintiff cannot recover for damages that reasonably could have been mitigated. *Id.*

38. *Id.* § 8.1(2), at 369.

39. SHAVELL, *supra* note 12, at 144.

40. MCCORMICK, *supra* note 28, at 127.

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they could have avoided.<sup>41</sup> To effectively further these economic goals, however, a personal injury victim is required to use only reasonable efforts in attempting to minimize economic losses.<sup>42</sup> This standard, it has been argued, should be a different, and in fact lower, standard of reasonableness than that used to determine negligence<sup>43</sup>—the reasonable person standard.<sup>44</sup> The rationale for a lower standard is that, whereas the tortfeasor had some choice in determining the course of conduct to take, the injured party had no choice and thus should not be required to expend the same energy and time in mitigating as the tortfeasor is required to expend in preventing the tort in the first instance.<sup>45</sup>

Regardless of the comparative magnitude of the standards, the reasonableness standard establishes the most economically sound parameter of the duty to mitigate by requiring the victim to affirmatively minimize losses “if the cost of so doing is less than the reduction in losses thereby accomplished.”<sup>46</sup> An example is helpful: “If a victim takes an action to mitigate losses due to an accident, the losses will equal 100; otherwise losses will equal 150. It will therefore be socially desirable for him to take the action if its cost is less than 50.”<sup>47</sup> This is socially desirable because defendants, in weighing their options pre-accident, use as their calculation for the magnitude of liability the “mitigated level of losses plus the costs of mitigation.”<sup>48</sup> Thus, if tort defendants were held responsible for damages that could have been, but were not, mitigated after using a “mitigated” figure of liability in the pre-accident analysis, defendants (or rather their insurer or society) would be responsible for damages that easily could have been avoided through pre-accident precautionary measures. As the economic goal of tort damages is to place the victim in as good a position as he would have been before the injury, the duty to mitigate aids in this endeavor in two ways: (1) by requiring defendants to pay for only those damages that the victim could not have reasonably avoided and (2) by providing an incentive for the victim to minimize potential losses to the extent reasonably possible through the threat of non-recovery of reasonably mitigable damages.

Interestingly, however, the duty to mitigate does not punish a victim who considers taking certain action to mitigate but then decides it would be

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41. See SHAVELL, *supra* note 12, at 145.

42. See *Williams v. United States*, 712 F. Supp. 1132, 1139 (S.D.N.Y. 1989) (presenting the standard as “whether [plaintiff] can by reasonable diligence find gainful employment” (quoting *O’Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1197 (7th Cir. 1982) (internal quotation marks omitted)); *Maranto v. Goodyear Tire & Rubber Co.*, 661 So. 2d 503, 509 (La. Ct. App. 1995) (“reasonable steps to mitigate damages”); *Templeton v. Chi. & Nw. Transp. Co.*, 628 N.E.2d 442, 450 (Ill. App. Ct. 1993) (holding that under federal law, a plaintiff has a “duty to mitigate damages by returning to gainful employment as soon as reasonably possible”); RESTATEMENT (SECOND) OF TORTS § 918 (1979).

43. See MCCORMICK, *supra* note 28, at 134.

44. See *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047, 1049 (Exch. Div.) (Alderson, B.); see also RESTATEMENT (SECOND) OF TORTS § 283 (1979).

45. MCCORMICK, *supra* note 28, at 134.

46. SHAVELL, *supra* note 12, at 145.

47. *Id.*

48. *Id.*

more reasonable not to take the action, only later to discover that taking the action would have reduced the damages.<sup>49</sup> One would assume that the more efficient resolution of the problem would be for the victim to “hedge” and take some action (though not to the full extent of the action contemplated). Doing so would at least minimize damages—or only minimally increase the cost of mitigation for which the defendant is responsible<sup>50</sup>—while at the same time reducing the risk that defendant is responsible for the full increase in damages that the plaintiff reasonably failed to mitigate.<sup>51</sup> So, in the previous example, if the victim believes that it is unreasonable to expend the full 50 to mitigate, the more economical approach may require the victim to expend 10 in hopes that 10 will adequately minimize further loss; thus, the tortfeasor would at a minimum be responsible for loss + 10 and at a maximum loss + 40, instead of a definite loss + 50 if the victim reasonably takes no action. However, as discussed above, this is not the state of the law, and thus, if the victim reasonably does nothing, the tortfeasor is responsible for loss + 50.

### III. JUDICIAL APPLICATION OF THE DUTY TO MITIGATE

Having laid the theoretical foundation for the economics of tort damages and the corresponding duty to mitigate, this Comment now explores whether judicial application of the reasonableness standard furthers these economic goals and, if not, whether the wealth of the victim unduly influences its application. Obviously, because this inquiry is centered on economics, the wealth of the victim will by definition have some influence on what constitutes reasonable mitigation. However, this Comment explores whether the wealth of the victim affects decisions finding reasonable mitigation or failure to reasonably mitigate despite possible adverse economic effects.<sup>52</sup>

#### *A. Minimum Wage Employment as Reasonable Mitigation*

In cases where the tort victim is a manual laborer or unskilled worker, acceptance of a minimum wage job serves as the “default” reasonable standard.<sup>53</sup> In other words, courts often find that such plaintiffs could have reasonably mitigated their economic damages simply by accepting minimum

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49. MCCORMICK, *supra* note 28, at 134.

50. *Id.* at 152 (explaining that a plaintiff is entitled to recover expenses reasonably incurred in attempting to mitigate).

51. *Id.* at 134 (“If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.”).

52. This Comment does not pass judgment on whether economic application of the reasonableness standard should be or is the proper goal of the reasonableness standard. It instead focuses on whether the standard furthers the economic goals of tort damages in mitigation, regardless of whether such application is the correct use of it in any particular case.

53. *See infra* cases cited this section.

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wage employment between the time of injury and judgment.<sup>54</sup> Those victims that do not accept or make an effort to accept such a job cannot recover for damages that reasonably could have been mitigated.<sup>55</sup> Since the effort expended by an unskilled or manual laborer plaintiff in finding such a job is usually low in relation to the marginal benefit gained by finding alternative work, the costs a defendant is responsible for as part of a plaintiff's duty to mitigate are minimized.<sup>56</sup> Furthermore, because the chances of a plaintiff being so severely injured that she cannot work at *any* minimum wage job are remote (thus nearly ensuring that any expenditures by plaintiff will yield such a job to the benefit of both the plaintiff and defendant),<sup>57</sup> the minimum-wage-default standard is an expected, if not preferred, result from an economic standpoint.

This result is evidenced in several cases where courts held that manual laborers or unskilled plaintiffs failed to reasonably mitigate where they did not accept any job. For example, in *Williams v. United States*,<sup>58</sup> the Southern District of New York held that it was unreasonable for an injured lifetime seaman not to accept work as a goldsmith (for which he had training) or in another lighter work occupation.<sup>59</sup> The court said that plaintiff was not required to "enroll in college or pursue a new career path of speculative financial reward" in order to mitigate his damages<sup>60</sup> but instead that "a worker who previously engaged in heavy labor may reasonably be expected to earn a living by switching to lighter work."<sup>61</sup> Some courts have even held that where a manual laborer plaintiff could perform other jobs given his injury-related restrictions, enrolling in school or other training instead of accepting those jobs may actually constitute unreasonable failure to mitigate.<sup>62</sup> This result is justifiable economically. Since the goal of tort damages is to place victims in the "same economic position as [they] would have

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54. See, e.g., *Thomas v. Plovodba*, 653 F. Supp. 1300, 1311 (E.D. Wis. 1987) (reducing the stevedore's loss of future earnings award by 20% or what he could have earned in a minimum wage job); *Hale v. Aetna Life & Cas. Ins. Co.*, 580 So. 2d 1053, 1056 (La. Ct. App. 1991) (calculating truck driver's loss of future earnings award and deducting from the award the amount that he could have earned at a minimum wage job); *Burke v. Safeway Stores, Inc.*, 554 So. 2d 184, 190 (La. Ct. App. 1989) (reducing secretary's award for past economic losses to reflect amount she could have earned at a minimum wage job).

55. E.g., *Thomas*, 653 F. Supp. at 1311 (reducing plaintiff's future lost earnings award after plaintiff failed to keep several job interviews and showed up to others sloppily dressed and with body odor).

56. See discussion *supra* note 41 and accompanying text.

57. But see David M. Trubek & Lance Compa, *Trade Law, Labor, and Global Inequality*, in *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR* 217, 221 (Paul D. Carrington & Trina Jones eds., 2006) (discussing the declining availability of minimum wage jobs as a result of global competition and the outsourcing of jobs to foreign workers).

58. 712 F. Supp. 1132 (S.D.N.Y. 1989).

59. *Id.* at 1139-40.

60. *Id.* at 1139.

61. *Id.*; see also *Hale v. Aetna Life & Cas. Ins. Co.*, 580 So. 2d 1053, 1056 (La. Ct. App. 1991) (reducing the loss of future earnings award given to an injured truck driver, who was no longer able to drive trucks, by the minimum wage he would have earned in a lighter work occupation).

62. See, e.g., *Yauch v. S. Pac. Transp. Co.*, 10 P.3d 1181, 1188 (Ariz. Ct. App. 2000) (holding district court erred in refusing to admit defendant's evidence of work-training program and jobs suitable for plaintiff within railroad even though plaintiff was enrolled in school to obtain a degree).

been [] had the injury not occurred,"<sup>63</sup> allowing victims to better their economic position by enrolling in school at the expense of the defendant<sup>64</sup> would not only mean that victims unduly forgo beneficial mitigation opportunities (accepting minimum wage job), but it also means that the defendants are responsible for damages exceeding the extent of their liability. Thus, for manual laborers or unskilled workers, reasonable effort or expenditure in an attempt to mitigate should require acceptance of minimum wage jobs if the only other option would be increased education or training.

But, despite courts' relatively unwavering construction of reasonableness equating to minimum wage employment, some courts have correctly realized that it would actually be uneconomical to force a plaintiff to search for and accept such employment. For example, in *Helmick v. Potomac Edison Co.*,<sup>65</sup> the plaintiff, an employee of a subcontractor, severely burned his arm while attempting to move a guy wire.<sup>66</sup> The plaintiff had a low IQ, grade school education, and was no longer able to perform manual labor.<sup>67</sup> In response to the defendant's argument that the plaintiff should have looked for additional work after being laid off due to his injury, the court sarcastically responded, "Perhaps [plaintiff] should have looked for work as a door stop in Southern California? We think not."<sup>68</sup> Similarly, in *O'Shea v. Riverway Towing Co.*,<sup>69</sup> it was reasonable for the plaintiff, an elderly towboat cook with severe scarring, whose only skill was cooking, not to look for additional employment given her minimal chances of finding a job.<sup>70</sup> Furthermore, in *Schneider v. National Railroad Passenger Corp.*,<sup>71</sup> the plaintiff did not unreasonably mitigate where she refused to accept the only job offered by her employer on the grounds that she was not physically capable of performing the job.<sup>72</sup> These holdings stem from the rule that the duty to mitigate does not apply where the victim is financially<sup>73</sup> or physically<sup>74</sup> unable to do what is required to mitigate. Viewed from an economic point of view, this is likely the correct result. The chances of such plaintiffs finding alternative employment, even a minimum wage job, would not in-

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63. STEIN, *supra* note 25, § 6:5, at 6-16.

64. The defendant is liable for expenses incurred in attempting to mitigate. *See* discussion *supra* note 36 and accompanying text.

65. 406 S.E.2d 700 (W. Va. 1991).

66. *Id.* at 703.

67. *Id.* at 708.

68. *Id.*

69. 677 F.2d 1194 (7th Cir. 1982).

70. *Id.* at 1197.

71. 987 F.2d 132 (2d Cir. 1993).

72. *Id.* at 136-37.

73. McCormick, *supra* note 36, at 345.

74. *See, e.g.,* *Earl v. Bouchard Transp. Co.*, 735 F. Supp. 1167, 1174 (E.D.N.Y. 1990) (exempting elderly tugboat deckhand from attempting to mitigate where the jury believed him to be no longer fit for sea duty and otherwise completely disabled), *aff'd in part, remanded in part*, 917 F.2d 1320 (2d Cir. 1990); *see also* 3 STEIN, *supra* note 25, § 18:17. *But see* *Maranto v. Goodyear Tire & Rubber Co.*, 661 So. 2d 503 (La. Ct. App. 1995) (reducing injured nurse's recovery for loss of future earnings by one-third even though she was capable of only performing five percent of the remaining nursing jobs, all in administration, and thus failed to obtain alternative employment).

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crease proportionally with the amount of effort expended searching for a job given the extent of their injuries: defendants should therefore prefer plaintiffs not expend resources on the small chance of finding another job in order to minimize the damages for which defendants are responsible. Reasonable economic mitigation in this case then justifies lack of mitigation.

Another exception to the minimum wage default standard includes cases where plaintiffs would be required to move in order to accept alternative employment. In *Templeton v. Chicago & Northwestern Transportation Co.*,<sup>75</sup> the court held that it would be unreasonable to require the plaintiff to accept a job offered by his former employer that required the plaintiff to move his family out of state.<sup>76</sup> Similarly, in *Hawkes v. Norfolk & Western Railway Co.*,<sup>77</sup> where the plaintiff refused a job offer from his former employer, the court suggested that he was reasonable in refusing the job for fear that he would be relocated but that reasonable mitigation might require him to accept a job in the town where he was currently living.<sup>78</sup>

These cases allowing exceptions from accepting alternative employment can also be justified on economic grounds. Because the cost of moving and related expenses would likely surpass the marginal benefit gained by plaintiffs accepting a minimum wage job, courts recognize that reasonableness in these circumstances cannot mandate requiring plaintiffs to move.<sup>79</sup>

However, in some jurisdictions and under the Federal Employers' Liability Act<sup>80</sup> (FELA), part of defendants' burden to prove unreasonable mitigation includes proving that other jobs suitable to plaintiffs actually existed.<sup>81</sup> The effect of this increased burden appears to undercut the economic justifications behind the duty to mitigate and, in particular, the acceptance of minimum wage jobs. For example, in *Wilson v. Union Pacific Railroad Co.*,<sup>82</sup> a railroad brakeman suing under FELA failed to attend an interview for a job as a security guard and did not work for eighteen months before the damages trial.<sup>83</sup> The court held that the plaintiff's failure to show up for a job interview was alone insufficient to justify a mitigation instruction; instead, because the defendant did not prove other jobs were available, the court found that plaintiff sufficiently mitigated to defeat a jury instruc-

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75. 628 N.E.2d 442 (Ill. App. Ct. 1993).

76. *Id.* at 454.

77. 876 S.W.2d 705 (Mo. Ct. App. 1994).

78. *Id.* at 707-08.

79. *See id.*

80. 45 U.S.C. §§ 51-60 (2000). The case law surveyed in writing this Comment revealed that most railroad worker plaintiffs sue under this Act.

81. Many states require as part of the defendant's burden of proving lack of mitigation to show not only that plaintiff was physically suited for other work but also that jobs for which plaintiff was suited actually existed. *See Ford v. GACS, Inc.*, 265 F.3d 670, 679 (8th Cir. 2001) ("It is not enough for the [defendant] to prove that the plaintiff made no effort to get other employment, but he must go further and prove that such employment could have been secured."); *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1232 (10th Cir. 1995) ("[T]he defendant must also show that appropriate jobs were available.").

82. 56 F.3d 1226 (10th Cir. 1995).

83. *Id.* at 1232.

tion.<sup>84</sup> Likewise, in *Ford v. GACS, Inc.*,<sup>85</sup> Missouri law required the defendant to show that other jobs were available to plaintiff.<sup>86</sup> The truck driver plaintiff made no effort to find alternative employment since he did not believe he could find a job that would pay as much as he was receiving from Social Security disability, workers' compensation, and pension disability benefits.<sup>87</sup> Relying on the plaintiff's injury, tenth grade education, and failure of defendant to show other jobs suitable to plaintiff existed, the court held it was not abuse of discretion for the trial court to refuse a mitigation instruction.<sup>88</sup>

An economically friendly reading of these cases suggests that courts are merely applying the heightened burden to define what constitutes reasonableness—plaintiffs act reasonably in not accepting jobs when there are no jobs available. Thus, such plaintiffs do not have the opportunity to mitigate and can recover for the amount of loss “that [plaintiffs] could not reasonably have avoided.”<sup>89</sup> On the other hand, if courts apply the heightened standard in hopes of lessening the plaintiffs' mitigation duty via a disguised transfer of burden to defendants, courts are sacrificing a prime economic goal of the duty to mitigate: incentive for victims to find alternative employment for fear of not recovering those expenses which were mitigable.<sup>90</sup> Thus, whether and to what extent this heightened standard stifles or furthers the economic goals of mitigation depends on the reasons that courts employ it; unfortunately, the few courts applying the standard do not adequately explain their reasoning.

Despite these rare exceptions, courts are relatively unwavering in their belief that tort victims are normally able to find *some* job that will minimize their damages, as illustrated by cases where the plaintiffs claim they did not accept alternative employment because no jobs existed.<sup>91</sup> In *Meshell v. Lovell*,<sup>92</sup> the defendant's vocational expert testified that of twenty-nine employers in the surrounding area, none were offering a full-time minimum wage position, and only one had a part-time minimum wage position available.<sup>93</sup> Despite the scarcity of jobs, the court agreed that the plaintiff's loss of future earnings award should be reduced by the amount she would have

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84. *Id.* A defendant is entitled to a jury instruction on mitigation when he presents sufficient evidence such that the jury may reasonably conclude that the plaintiff failed to mitigate. *See* *Fox v. Evans*, 111 P.3d 267, 269-70 (Wash. Ct. App. 2005) (giving mitigation instruction in personal injury action); *Lake v. Gautreaux*, 893 So. 2d 252 (Miss. Ct. App. 2004); *see also* 1 ALA. PATTERN JURY INSTR. CIV. § 11.29 Mitigation (2d ed. 1993).

85. 265 F.3d 670 (8th Cir. 2001).

86. *Id.* at 679.

87. *Id.*

88. *Id.*

89. *See* SHAVELL, *supra* note 12, at 145-46.

90. *See supra* note 41 and accompanying text.

91. These cases are in jurisdictions that do not require the defendant to show that actual jobs existed as part of his burden of proving unreasonable mitigation. *See supra* note 81 and accompanying text.

92. 732 So. 2d 83 (La. Ct. App. 1999).

93. *Id.* at 88.

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earned at a hypothetical, full-time minimum wage job.<sup>94</sup> Similarly, in *Maranto v. Goodyear Tire & Rubber Co.*,<sup>95</sup> a nurse was not saved from failing to mitigate despite the fact that she was capable of only performing five percent of the remaining nursing jobs, of which none were available.<sup>96</sup> A dissenting judge argued that it was error to reduce the plaintiff's recovery by one-third given the unrealistic possibility that she can perform any of the five percent of remaining administrative nursing activities.<sup>97</sup> As long as such holdings do not have the effect of increasing the cost of mitigation beyond "the reduction in losses thereby accomplished,"<sup>98</sup> these cases are effective at ensuring that the economic goals of tort damages are met.

*B. A Compromise Between the Minimum Wage and Professional Standard*

Courts' application of the reasonableness standard is less consistent in furthering the economic goals of tort damages when the tort victim has a more skilled or education-based occupation. In these cases, courts waver between applying the minimum wage default standard and the professional standard of reasonableness.<sup>99</sup>

For example, the "education versus minimum wage employment" dichotomy does not apply only to manual laborers or unskilled workers. Plaintiffs with some education and training are also not exempted from accepting a minimum wage job merely because they are in the process of receiving additional training in order to obtain meaningful employment. In *Burke v. Safeway Stores, Inc.*,<sup>100</sup> the plaintiff was a legal secretary with an educational background in cosmetology.<sup>101</sup> The plaintiff was effectively prohibited from working as a secretary or cosmetologist after an exploding bottle lacerated her ring and index fingers.<sup>102</sup> Thereafter, she began pursuing a bachelor's degree in English shortly before trial.<sup>103</sup> The court, however, reduced her award by the amount she would have earned working a minimum wage job during the period between the injury and the time she began to pursue her degree.<sup>104</sup> The court noted that beginning her bachelor's study earlier (i.e., soon after the injury) would have negated the need for her to find a minimum wage job.<sup>105</sup> However, in *Fitzpatrick v. United States*,<sup>106</sup> a beautician received a neck strain severe enough to relegate her to only part-

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94. *Id.*

95. 661 So. 2d 503 (La. Ct. App. 1995).

96. *Id.* at 509-10.

97. *Id.* at 510 (Brown, J., dissenting).

98. SHAVELL, *supra* note 12, at 145; *see also supra* note 46 and accompanying text.

99. *See* discussion *infra* Part III.B and accompanying text.

100. 554 So. 2d 184 (La. Ct. App. 1989).

101. *Id.* at 186.

102. *Id.*

103. *Id.* at 189.

104. *Id.* at 190.

105. *Id.*

106. 754 F. Supp. 1023 (D. Del. 1991).

time work.<sup>107</sup> The court held that, although the plaintiff did not return to work with minimal accommodations when she was capable of doing so,<sup>108</sup> she reasonably mitigated her loss of future earnings by enrolling in paralegal school and obtaining a job at a bank.<sup>109</sup> So, unlike the plaintiff in *Burke* who was denied an award for loss of future earnings because she failed to work before beginning school, the plaintiff in *Fitzpatrick* preserved her entitlement to loss of earnings by working at a bank (thus reducing her actual damages) before enrolling in paralegal school.

The justification for these seemingly inconsistent holdings is likely that the ultimate goal of mitigation, to prevent needless societal waste of resources,<sup>110</sup> is not fulfilled when plaintiffs do not accept *any* employment but is met where plaintiffs accept *some* employment, even while also enrolled in school or training programs. Furthermore, unlike professionals,<sup>111</sup> these minimally skilled workers have not invested large sums of resources into securing their occupation and, based on their “utility, wealth or welfare,”<sup>112</sup> can easily be returned to the same pre-injury position by accepting minimum wage jobs.

Likewise, courts at times are equally fervent about the need for *some* employment in order to find reasonable mitigation. For example, in *Bell v. Shopwell*,<sup>113</sup> the trial court awarded \$600,000 to the plaintiff for loss of earning capacity after injuring his knee.<sup>114</sup> The appellate court reduced this award by half after finding that the plaintiff failed to reasonably seek vocational rehabilitation, which would have increased his chances of finding gainful employment.<sup>115</sup> The court held that reasonable efforts to seek vocational rehabilitation would include equipping his car with special controls (to alleviate plaintiff’s “anticipated difficulty in reaching any training site”)<sup>116</sup> and locating a rehabilitation center that did not have stairs (so as to alleviate the problem of him having to climb stairs).<sup>117</sup> Although the court did not elaborate on the nature of the plaintiff’s injuries or on his pre-injury occupation, it is hard to imagine how the costs this plaintiff will incur<sup>118</sup> in mitigating (equipping his car with special controls) can be justified by the slightly increased chances that through vocational rehabilitation he will be able to secure a job.

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107. *Id.* at 1037.

108. And thus she was denied an award for lost wages. *Id.* at 1039.

109. *Id.*

110. See McCormick, *supra* note 36, at 331.

111. See discussion *supra* Part II.B.

112. See Coleman, *supra* note 14, at 228.

113. 501 N.Y.S.2d 129 (N.Y. App. Div. 1986).

114. *Id.* at 130.

115. *Id.* at 131.

116. *Id.*

117. *Id.*

118. These costs, of course, will be passed on to the defendant in the form of reasonable mitigation expenses. See McCormick, *supra* note 36, at 337.

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However, in this middle ground, courts lean toward applying the professional standard, discussed below, in holding that what otherwise would constitute unreasonable mitigation is sufficient. In *Tannehill v. Jogyuro, Inc.*,<sup>119</sup> the plaintiff was an accounting clerk who sustained a herniated disc and other back injuries as a result of falling in defendant's tavern.<sup>120</sup> The plaintiff attempted to resume work at her former employer but, following back surgery and increased pain, eventually had to quit.<sup>121</sup> The trial court denied defense questioning regarding plaintiff's efforts at seeking Americans with Disability Act<sup>122</sup> (ADA) accommodations.<sup>123</sup> The appellate court affirmed, finding that plaintiff's attempted work and her enrollment in nine hours of classes at a local university was reasonable mitigation.<sup>124</sup> The holding illustrates that some courts are less insistent that plaintiffs accept some kind of employment in order to sufficiently mitigate, much like the courts that apply the professional standard but very different from the strict minimum wage courts.<sup>125</sup>

### C. Mitigation in Professional Occupations

Although judicial application of the reasonableness standard to this point has proven to be relatively consistent in furthering the economic goals of tort damages, the same cannot be said for judicial application of the reasonableness standard to professionals. In fact, these cases illustrate that the reasonableness standard is oftentimes not applied with the aim of achieving economically sound outcomes, but instead, it is frequently applied with the judicial eye fixated on some other decisive factor. In the professional context, the focus of mitigation is not necessarily on whether victims' efforts or expenditures in mitigating are sufficient; instead, the focus is more on whether plaintiffs were reasonable in accepting or refusing to accept certain jobs.<sup>126</sup>

The paradigm case reflecting a shift in reasonableness focus is *Philippe v. Browning Arms Co.*<sup>127</sup> A dentist of sixteen years sued a gun manufacturer after defendant's gun accidentally discharged, severing the thumb of plain-

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119. 712 So. 2d 238 (La. Ct. App. 1998).

120. *Id.* at 241.

121. *Id.*

122. 42 U.S.C. § 12101 (2000).

123. 712 So. 2d at 244.

124. *Id.*

125. *See, e.g., Williams v. United States*, 712 F. Supp. 1132 (S.D.N.Y. 1989); *see also supra* notes 58-64 and accompanying text.

126. The Restatement requires only reasonable "effort or expenditure." RESTATEMENT (SECOND) OF TORTS § 918 (1979). However, many states' mitigation standards do not narrowly limit the reasonable-ness requirement merely to "effort or expenditure." *See, e.g., Yauch v. S. Pac. Transp. Co.*, 10 P.3d 1181, 1187 (Ariz. Ct. App. 2000) (plaintiff satisfies mitigation duty by "returning to gainful employment as soon as reasonably possible" (quoting *Hawkes v. Norfolk & W. Ry. Co.*, 876 So. 2d 705, 706 (Mo. Ct. App. 1994) (internal quotation marks omitted))).

127. 395 So. 2d 310 (La. 1981).

tiff's dominant hand.<sup>128</sup> Within one year, the plaintiff secured a job as a part-time dentist consultant making \$25.00 per hour.<sup>129</sup> The defendant argued at trial that the plaintiff could have earned more money in dental sales or in the real estate business, for which plaintiff had some training.<sup>130</sup> The Louisiana Supreme Court held that the trial court did not err in finding that plaintiff reasonably mitigated his damages by working only as a dental consultant on a part-time basis, saying that "the trial court could properly have concluded that [the] defendants failed to prove that other reasonable work opportunities were actually available to a person of plaintiff's education, training, experience and physical ability."<sup>131</sup> While offered in support of its ruling, this comment seems to undercut the court's own justification for affirming.<sup>132</sup> A more likely rationale for its holding can be found later in the opinion when the court recognized that the trial court "expressly found that plaintiff showed strong motivation in continuing his professional career under adverse circumstances not of his own making."<sup>133</sup> If the court was saying that the "reasonable effort or expenditure" test of the Restatement<sup>134</sup> was met because the defendant failed to prove other jobs existed, the holding is consistent with application of the reasonableness standard to other occupations;<sup>135</sup> on the other hand, if the court was saying that the "reasonable effort or expenditure" test of the Restatement was met because the plaintiff was trained in and wanted to remain in the dental field, the holding suggests that the court blatantly disregarded the economic principles behind tort damages and the duty to mitigate in favor of awarding full expenses to plaintiff based on some other social factors.<sup>136</sup>

Another professional mitigation case reaching a similar conclusion is *Walmsley v. Brady*.<sup>137</sup> A veterinarian with training in the narrow field of equine surgery sought damages for loss of earnings following a car accident.<sup>138</sup> The plaintiff calculated her lost earnings based on what she would

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128. *Id.* at 312.

129. *Id.* at 314.

130. *Id.* at 317.

131. *Id.*

132. If the plaintiff was so educated, trained, and experienced, he should have had no problem in finding a job where he would earn at least as much, if not more, as he did as a dentist. In fact, the court recognized two such jobs earlier in the opinion—dental sales and real estate. *Id.*

133. *Id.*

134. RESTATEMENT (SECOND) OF TORTS § 918 (1979).

135. Many states require as part of the defendant's burden of proving lack of mitigation to show not only that plaintiff was physically suited for other work but also that jobs for which plaintiff was suited actually existed. *See Ford v. GACS, Inc.*, 265 F.3d 670, 679 (8th Cir. 2001) ("It is not enough for the [defendant] to prove that the plaintiff made no effort to get other employment, but he must go further and prove that such employment could have been secured."); *Wilson v. Union Pac. R.R. Co.*, 56 F.3d 1226, 1232 (10th Cir. 1995) ("[T]he defendant must also show that appropriate jobs were available.").

136. This latter reading lends support to academics critical of the use of the reasonableness standard in torts cases, who argue that the standard gives judges too much discretion to make decisions based on individualized calculations of social values. G. EDWARD WHITE, *TORT LAW IN AMERICA* 228 (2003) (discussing this as a criticism that Professor Richard Epstein has with the reasonableness standard).

137. 793 F. Supp. 393 (D.R.I. 1992).

138. *Id.* at 394.

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have earned as an equine surgeon.<sup>139</sup> The defendant answered that plaintiff was still capable of performing “veterinary medicine in a modified form” or serving in an administrative role at a veterinary clinic.<sup>140</sup> The specific issue before the court was how, if at all, it would instruct the jury on the issue of mitigation.<sup>141</sup> After acknowledging that the plaintiff’s career in veterinary medicine had not completely ended, the court said that it is “just as true that she no longer can practice the variety of veterinary medicine for which she has been trained.”<sup>142</sup> Thus, the court said its instruction to the jury would include the sentence, “The plaintiff is not required to mitigate damages to such an extent as to alter her professional career path to an unreasonable degree.”<sup>143</sup> Had the court stopped there, the instruction could have been reconciled with the economic goals of tort damages: it would be unreasonable for the court to ask the plaintiff to accept a lower paying, minimum wage job, given the amount of resources the plaintiff likely had invested into becoming a specialized veterinarian. However, the court’s instruction went on to say, “As to reasonableness, the plaintiff is not required to accept alternative employment even though she could earn more money in said employment, provided that the higher paying job is unreasonably different from her chosen occupation.”<sup>144</sup>

Although the professional mitigation cases are rare, the last sentence of the court’s instruction further illustrates that at least some courts are not applying the reasonableness standard to professionals so as to further the economic goals of the mitigation duty; it furthermore solidifies that the court in *Philippe* believed the dentist’s desire to remain in the dental profession was sufficiently reasonable to justify his not seeking a higher paying job outside of the profession.<sup>145</sup> The essence of these two cases is that the duty to mitigate does not require professionals to accept employment outside of their chosen profession, even if they could find employment making more money than they were in their pre-injury job. At the risk of stating the obvious, this standard of reasonableness<sup>146</sup> does not further the economic goals of the mitigation duty and is not the same standard of reasonableness that is applied to other tort victims.<sup>147</sup> The professional standard does not further economic goals of mitigation because the professional is allowed to forgo accepting higher paying jobs (acceptance of which would drastically reduce, if not eliminate, damages for lost wages) that the professional could obtain without expending substantial resources on mitigation (the job mar-

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Walmsley*, 793 F. Supp. at 395.

143. *Id.*

144. *Id.*

145. *Philippe v. Browning Arms Co.*, 395 So. 2d 310, 317-18 (La. 1981).

146. For simplicity, I will call it the “professional standard.”

147. *See, e.g., Burke v. Safeway Stores, Inc.*, 554 So. 2d 184 (La. Ct. App. 1989) (finding that reasonable mitigation included the drastic measures of equipping plaintiff’s car with special controls in order to simply travel to vocational rehabilitation facility).

ket is much more favorable to a highly educated professional). The professional standard thus provides no incentive for professional plaintiffs to take advantage of an otherwise economically-ideal mitigation scenario.

Contrasting the use of the professional standard with a case applying the traditional standard of reasonableness illustrates the leniency afforded professionals making mitigation decisions. In *Hawkes v. Norfolk & Western Railway Co.*,<sup>148</sup> the plaintiff was a nineteen year veteran brake and switchman for the defendant railway company who had experimented in management positions with the company.<sup>149</sup> After sustaining an injury requiring knee surgery, the plaintiff was no longer able to serve in his manual laborer capacity with defendant without appropriate rehabilitation.<sup>150</sup> Rather than seeking treatment, he instead mailed 125-150 resumes to prospective employers, sought the services of a vocational counselor, and accepted a position with the city clerk's office before trial.<sup>151</sup> Despite these efforts, the court held that a mitigation instruction was proper since there was "substantial evidence from which the jury could conclude there was a failure to mitigate damages."<sup>152</sup> The evidence the court referred to was defendant's testimony that it offered several administrative positions to the plaintiff and that plaintiff refused to meet with the defendant's rehabilitation counselor.<sup>153</sup> The plaintiff's justifications for not accepting the positions offered (concerns about job security and the required move to a different city) were apparently summarily dismissed by the court in finding a question of fact for the jury.<sup>154</sup> This case illustrates that the reasonableness standard applied to non-professional plaintiffs affords less leniency in what constitutes reasonable mitigation than the professional standard affords professionals.

But the question remains, even if the standard is different, is there an economically sound justification for applying different standards? The courts that decided *Philippe* and *Walmsley* did not provide an explanation for their holdings that reasonable mitigation did not require their respective plaintiffs to accept jobs outside of the plaintiffs' chosen occupation. There are two possible explanations for the holdings: one furthers the economic goals of tort damages, and the other does not. First, the professional standard of reasonableness might take into account the time, energy, and money spent by professionals in obtaining their high level of education and experience in their respective professions; on the other hand, manual or unskilled laborers do not incur similar expenses in obtaining their jobs. This view is similar to the tort doctrine that the tortfeasor takes his victim as he finds them.<sup>155</sup> Thus, the defendant cannot complain that the professional plaintiff

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148. 876 S.W.2d 705 (Mo. Ct. App. 1994).

149. *Id.* at 707.

150. *Id.*

151. *Id.*

152. *Id.* at 708.

153. *Id.* at 707.

154. *Id.*

155. See RESTATEMENT (SECOND) OF TORTS § 461 (1979); see also SHAVELL, *supra* note 12, at 128.

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inadequately mitigated by failing to accept employment outside of their chosen profession, when the professional plaintiff has expended large amounts of resources in achieving his professional status—the injured plaintiff cannot be blamed for not wanting to forfeit any chance he has to remain in his profession, even in a lower paying position. The economic rationale behind this theory is that the plaintiff is being “made whole” by the defendant only when he is allowed to remain in the profession of his choosing, whereas the plaintiff would not be made whole if the duty to mitigate forced him to abandon the profession in which he expended so many resources.

The flaw with this approach, though, is that the economics of mitigation focus only on plaintiffs’ earnings and earning capacity from the time of injury to the time of judgment and not on the expenses incurred in becoming a professional. Applying the facts of *Philippe*<sup>156</sup> to our example,<sup>157</sup> if the plaintiff dentist expended 10 in an effort to mitigate (10 represents work as a dental consultant) instead of 50 in an effort to mitigate (50 represents taking a job in the potentially higher paying real estate business), the defendant is still responsible for 140 loss as opposed to being responsible for only 100 under the latter scenario. Furthermore, the mitigation formula does not account for plaintiffs’ pre-injury expenses. Therefore, in order for courts to justify this amazingly uneconomic result, they must be relying on factors other than economics.

Thus, the second justification that might be offered by courts applying the professional standard revolves around the plaintiff’s prerogatives and quasi-entitlement to remain in the occupation of his choice, based in part on what particular judges “feel” is the right result. The problem with this justification is not only that it fails to fulfill the economic goals of tort damages but that its departure from those goals erodes the predictability of law thought to be essential in a legal system of stare decisis and precedent.<sup>158</sup> In addition to not furthering the economic principles behind tort damages, this interpretation of the courts’ opinions is even more problematic in light of our tort system that arguably already favors wealthy plaintiffs over poorer plaintiffs.<sup>159</sup> While applying the mitigation rule in a way that fails to further the economic goals of tort damages may not in and of itself be a damning characteristic, the threat of applying the mitigation rule in a manner that benefits some while harming others definitely is.<sup>160</sup> This “distributive injustice” characteristic of our tort system alone handicaps plaintiffs of less

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156. *Philippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1981); *see also supra* text accompanying notes 127-133.

157. *See supra* text accompanying note 47.

158. *See Brophy, supra* note 11, at 1193 (“The problem with using sentiment to explain law is that it does not predict results in particular cases, for sentiments can lead in many directions.”).

159. *See* Jeffrey O’Connell & John Linehan, *The Rise and Fall (and Rise Again?) of Accident Law: A Continuing Saga*, in *LAW AND CLASS IN AMERICA*, *supra* note 57, at 349, 356 (recognizing the inequity our tort system creates between different classes of plaintiffs).

160. *See* KARSTEN, *supra* note 11, at 79 (discussing nineteenth century application of laws that “favored defendants over plaintiffs, businesses over individuals,” and “showed a definite preference for enterprise, for business defendants” (internal quotation marks omitted)).

wealth and lower social status attempting to regain their pre-accident way of life.<sup>161</sup> To compound this burden with an application of the reasonableness standard that not only fails to serve its economic goals but in fact increases the post-accident burden of an entire class of plaintiffs is cause for concern and deserves close attention.

#### IV. CONCLUSION

The primary economic goal of tort damages is to put the tort victim in as good a position as she would have been without the injury. The duty to mitigate plays a vital role in furthering this goal by ensuring that the defendant is responsible for damages only to the extent of his liability, and not for damages that the victim could reasonably have avoided, while at the same time compensating victims for resources expended in attempting to mitigate. However, in actuality, the reasonableness standard that is applied to professionals is a different standard than that applied to non-professionals. This result is obvious when observing the minimum wage cases and professional mitigation cases, where it is reasonable in the latter for plaintiffs to choose courses of action that do not further the economic goals of the duty to mitigate and tort damages in general. While the explanation for applying a different standard is unclear, it is hard to justify, given the nondiscriminatory duty to mitigate, without relying on factors apart from the economic justifications of mitigation.

*William T. Paulk*

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161. PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 118-19 (1997) (discussing our tort system's "distributive injustice" characteristic by increasing the amount poorer plaintiffs pay for the same tort coverage that wealthier plaintiffs receive).